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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GRUMMAN OHIO CORPORATION,
GRUMMAN ALLIED INDUSTRIES, INC. and
GRUMMAN CORPORATION,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
1. THE DISPUTES CLAUSE IS AN ARBITRATION AGREEMENT WITHIN THE SCOPE OF THE FEDERAL ARBITRATION ACT	1
2. FEDERAL LAW REQUIRES THE NEW YORK COURT TO DISJOIN AND SEND TO ARBITRATION THOSE FACTUAL DISPUTES WITHIN THE SCOPE OF THE CLAUSE	2
3. THE NEW YORK COURT MISAPPLIED *UTAH CONSTRUCTION*	6
CONCLUSION	8

TABLE OF AUTHORITIES

	PAGE
Aetna Insurance Co. v. *United States*, 327 F. Supp. 865 (E.D. La. 1971)	2
Bethlehem Steel Corp. v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969)	6-8
Corbetta Construction Co. v. *Michigan Mutual Liability Co.*, 20 A.D.2d 375, 247 N.Y.S.2d 288 (1st Dept. 1964), *aff'd*, 15 N.Y.2d 888, 258 N.Y.S.2d 423 (1965)	2
Dean Witter Reynolds, Inc. v. *Byrd*, 105 S. Ct. 1238 (1985)	4-5
Grinnell Fire Protection Systems Co. v. *Regents of the University of California*, 554 F. Supp. 495 (N.D. Cal. 1982)	2
Grumman Ohio Corp. v. *Dole*, 776 F.2d 338 (D.C. Cir. 1985)	3-4,6
Humphreys & Harding, Inc. v. *Pittsburgh-Des Moines Steel Co.*, 397 F.2d 227 (4th Cir. 1968)	2
Moran Towing & Transportation Co. v. *United States*, 290 F.2d 660 (2d Cir. 1961)	2
Regional Transportation Authority v. *Grumman Ohio Corp.*, No. 83-C-4399, Memorandum Opinion and Order (N.D. Ill. Jan. 18, 1985)	3
Regional Transportation Authority v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982)	4-8
Trans-Continental & Western Air, Inc. v. *Parker*, 144 F.2d 735 (8th Cir. 1944)	2
United States v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966)	4-8
Wymard v. *McCloskey & Co.*, 190 F. Supp. 420 (E.D. Pa. 1960), *aff'd*, 292 F.2d 839 (3d Cir. 1961)	2
Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq*	*passim*
Wunderlich Act, 41 U.S.C. §§ 321 *et seq*	3

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Petitioners, Grumman Ohio Corporation, Grumman Allied Industries, Inc. and Grumman Corporation (collectively "Grumman"), respectfully submit this reply to respondents' brief in opposition to Grumman's petition for a writ of certiorari.

1. The Disputes Clause Is An Arbitration Agreement Within The Scope Of The Federal Arbitration Act.

Respondents' primary argument is that the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, (the "Act") has no application to this case because the Disputes clause is not an arbitration agreement enforceable under the Act. Respondents further assert that the State court found, as a factual matter, that the parties did not intend the Disputes clause to be an arbitration agreement. There is no basis for these assertions.

Respondents do not suggest that the Disputes clause, however it may be categorized, is not binding upon the parties. Rather, they claim that the clause is not an arbitration clause under the Act because it "not once mentions the word 'arbitration,'" sets no

"standards," appoints a "blatantly partial" party to resolve disputes, and for other such reasons. Resp. Brief at 4. These observations, however, do not alter the fact that the Disputes clause obligates the parties to resolve disputes within the clause in a nonjudicial forum and not, as the New York courts have required in this case, before local courts and juries. In actuality, respondents' argument finds no support even in the New York court, which acknowledged that the Disputes clause was an arbitration clause under the Act but concluded that at least some of the claims set forth in respondents' complaint were not within its terms. *See also, Corbetta Construction Co.* v. *Michigan Mutual Liability Co.*, 20 A.D.2d 375, 379, 247 N.Y.S.2d 288, 292 (1st Dept. 1964), *aff'd*, 15 N.Y.2d 888, 258 N.Y.S.2d 423 (1965) ("Although [the Disputes clause provides that] the 'arbitrator' is an agency of one of the contracting parties, that makes it no less an arbitration; and if the parties agree on such method of determination, as they did here, it is perfectly legal and proper"). Other courts have likewise characterized the Disputes clause as an arbitration clause. *See e.g., Humphreys & Harding, Inc.* v. *Pittsburgh-Des Moines Steel Co.*, 397 F.2d 227, 231 (4th Cir. 1968); *Trans-Continental & Western Air, Inc.*v. *Parker*, 144 F.2d 735, 736 (8th Cir. 1944); *Grinnell Fire Protection Systems Co.* v. *Regents of the University of California*, 554 F. Supp. 495, 499 (N.D. Cal. 1982); *Wymard* v. *McCloskey & Co.*, 190 F. Supp. 420, 425 (E.D. Pa. 1960), *aff'd*, 292 F.2d 839 (3d Cir. 1961).[1]

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1. Respondents' reliance upon *Moran Towing & Transportation Co.* v. *United States*, 290 F.2d 660 (2d Cir. 1961), which they quote out of context, and *Aetna Insurance Co.* v. *United States*, 327 F. Supp. 865 (E.D. La. 1971), is misplaced. Neither decision "held that the standard dispute clause 'is not a situation covered by the Federal Arbitration Act . . . as the Disputes Clause . . . does not provide for arbitration,'" as stated by respondents. Resp. Brief at 9-10. Nor did either case involve a construction of the clause in the context of a contract between nonfederal parties. *Moran* held only that a stay of an action against the United States pending administrative proceedings under a Disputes clause in a contract with the United States is an interlocutory and nonappealable order. 290 F.2d at 662. In fact, the court analogized to arbitration and "the reasoning of the cases holding stays in pending actions to await the decision of arbitrators to be interlocutory and not appealable . . .," and the decision is thus consistent with Grumman's position. In *Aetna*, which also involved a federal government contract,

Moreover, contrary to respondents' suggestion, District Judge Shadur, in the *RTA litigation*, has expressly referred to the exact same Disputes clause at issue in this proceeding as an "arbitration clause," *Regional Transportation Authority* v. *Grumman Ohio Corporation*, No. 83-C-4399, Memorandum Opinion and Order at 8, (N.D. Ill. Jan. 18, 1985), and the majority opinion in *Grumman Ohio Corporation* v. *Dole*, 776 F.2d 338 (D.C. Cir. 1985), while holding that UMTA has no obligation to provide *de novo* review under the clause, accepts the view of the Illinois District Court that the clause covers the types of factual disputes at issue in this litigation. 776 F.2d at 344 n.4. Indeed, the court in *Dole* suggests that Grumman seek the appointment of a substitute arbitrator in the Illinois litigation. 776 F.2d at 348-49.

The factors which have led every other court to view the Disputes clause either as an arbitration clause or, in the context of disputes involving the federal government, analogous to one, also caused the State court in this litigation to view the clause as an arbitration agreement subject to the Federal Arbitration Act. The trial court on its own initiative converted Grumman's motion to dismiss into a motion to compel arbitration and recognized that the extent to which the parties' factual disputes are subject to arbitration is a matter to be determined under the Act:

> The interpretation of the contracts, based primarily on the intent of the contracting parties, is determined by federal substantive law since the transaction involves interstate commerce. (USC Title 9 Sec. I . . .)

Petition at 4a.

Respondents' assertion that the court found, as a factual matter, that the parties did not intend to arbitrate is in error. As the opinion of the New York Supreme Court, the only opinion in the case, makes clear, the court reached its conclusion as a matter of

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the court similarly viewed the Disputes clause as analogous to an arbitration agreement, but held that the Wunderlich Act, 41 U.S.C. §§321 *et seq.*, not the Federal Arbitration Act, governed the resolution of disputes to which the United States is a party. 327 F. Supp. at 866. Since the United States is not a party here, the issues in these cases have no relevance to the issue in this case.

law, relying upon *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966).

The New York court does refer also to UMTA's unwillingness to act as an arbitrator, which, as respondents point out, has been upheld in *Dole*. Respondents ignore the fact, however, that the issue in *Dole* was not whether the Disputes clause is an arbitration agreement—Judge Shadur had already ruled that the parties first had to proceed under the Disputes clause[2]—but simply whether UMTA was obligated to provide a *de novo* review under the clause. While the dissent in *Dole* would answer the latter issue affirmatively, even the majority opinion accepts Judge Shadur's ruling and goes to pains to point out that UMTA's refusal to provide *de novo* review has nothing to do with whether the Disputes clause is an arbitration agreement otherwise binding on the non-federal parties. *See, e.g.*, 776 F.2d at 349.

2. Federal Law Requires The New York Court To Disjoin And Send To Arbitration Those Factual Disputes Within The Scope Of The Clause.

Respondents also argue that the disputes between the parties are not subject to arbitration since, under *Utah Construction*, their claims are not fully redressable under the contract. In fact, respondents' claims may be fully redressable under the warranty provisions of the contract. Nevertheless, respondents and the court below ignore both the language of the Disputes clause and the vast body of arbitration law, including several recent decisions of this Court, requiring the court to send to arbitration those issues within the scope of the arbitration agreement, notwithstanding the presence of non-arbitrable issues. *See, e.g., Dean Witter Reynolds, Inc.* v. *Byrd*, 105 S.Ct. 1238 (1985).

The court below, relying upon *Utah Construction*, decided that the parties could not have "intended" to submit "complex factual and legal issues relating to violations of the U.C.C., fraud and punitive damages to a contracting officer." Petition at 6a. No effort whatsoever was made to determine whether any factual

2. *Regional Transportation Authority* v. *Grumman Flxible Corp.*, 532 F. Supp. 665 (N.D. Ill. 1982).

issues in dispute were within the scope of the clause because of the mistaken view that the action "should be judicially determined unless all issues can be completely resolved administratively." *Id.*

One basic factual dispute underlies each of respondents' claims in this litigation, whether such claims are pleaded in contract, warranty or tort: whether the alleged defects in the buses removed from service by respondents are remediable under the warranty provisions of the contract. This factual dispute clearly is within the scope of the Disputes clause, which expressly applies to "any dispute concerning a question of fact arising under th[e] contract." As Judge Shadur observed in the *RTA litigation*, which involves similar factual disputes, an essentially identical contract, the exact same Disputes clause, and a plaintiff purporting to state claims in contract and tort, such disputes, even in *Utah Construction* terms, appear "redressable under specific contract adjustment provisions," namely, the warranty provisions. 532 F. Supp. at 666.

Moreover, nothing in the language of the clause, or in *Utah Construction*, indicates that the clause does not apply to "complex" issues or to factual disputes arising under the contract which also may relate "to violation of the U.C.C., fraud and punitive damages." To the contrary, this Court, in *Utah Construction*, recognized that any claim, "whether within or without the disputes clause" can be cast in breach of contract language and the contractual and statutory scheme would thereby "be too easily avoided." 384 U.S. at 419.

The New York court made no attempt to distinguish arbitral from non-arbitral issues. It thus failed to disjoin and send to arbitration those factual disputes within the scope of the clause. Even if the clause does not cover all of the "complex factual and legal issues" presented in the complaint, the failure to disjoin the arbitral issues is contrary to this Court's decision in *Dean Witter*. To the extent that the New York court's failure is based upon *Utah Construction*, this Court should resolve the apparent conflict between *Utah Construction* and *Dean Witter* in a situation

where non-federal parties agree to adopt the standard federal government Disputes clause as their arbitration agreement.

3. The New York Court Misapplied Utah Construction.

The *Utah Construction* case involved a contract to which the United States was a party. The Court's attempt in that case to delineate the jurisdiction of the Claims Court and the respective boards of contract appeals under the Disputes clause is relevant only to cases in which the United States is a party since disputes between non-federal parties cannot reach the Claims Court under any circumstances. The narrow and highly technical distinctions among the types of disputes subject to the Disputes clause procedures which the Court discussed were based on the clause's historical evolution rather than on its language. 394 U.S. at 407.

There is no reason for these same distinctions to be made when the language of the Disputes clause is used in contracts between private parties, as is the case here. In this situation, the clause should be interpreted as any other agreement to arbitrate and the relevant guidelines should be those found in arbitration law, not federal procurement law.

District Judge Shadur succeeded in reconciling the conflicting arbitration and procurement law principles by holding that any issue as to whether the alleged defects in the buses were remedial under the contract's warranty procedures should be decided in accordance with the arbitral procedures set forth in the clause. This is the same result reached by the court in *Bethlehem Steel Corp.* v. *Grace Line, Inc.*, 416 F.2d 1096 (D.C. Cir. 1969). In this case, however, the New York courts have rejected any such approach and have instead relied entirely on federal procurement law principles to deny Grumman its rights under the Federal Arbitration Act.[3]

3. Respondents allege that "Grumman itself argued before the New York Courts below in this action and other courts in other Model 870 litigation that *Utah Construction* and its progeny applied to the Model 870 Disputes clause." Resp. Brief at 11. As respondents' brief recognizes, however, Grumman cites those portions of *Utah Construction* which discuss the *procedures* encompassed by the Disputes clause language as further evidence of the arbitral nature of the clause. Indeed, in *Dole*, the only issue was the procedures required under the clause, *i.e.*,

Respondents argue that the decision below does not conflict with *Bethlehem Steel* because here there is "a full record below including the Contracts and all their provisions upon which the New York courts relied in finding that the claims in plaintiffs' complaint did not fall within the Disputes Clause." This argument begs the question. Procedurally, both the court in *Bethlehem Steel* and the court below looked at the claims asserted and the contractual arbitration provision. Yet in *Bethlehem Steel* the court was "unable to say . . . that 'as a matter of law' the disputes clause does not encompass [Grace's] claim," 416 F.2d at 1104, while the New York court decided, as a matter of law, that none of the issues in this litigation could be resolved under the Disputes clause procedures. The State court reached this conclusion notwithstanding the diametrically opposite result in the *RTA litigation*. Respondents' suggestion that the court below made factual "findings" based on a "full record" is refuted by the State court's opinion.

Respondents also seek to distinguish *Bethlehem Steel* on the basis that UMTA does not want to adjudicate the disputes between the parties and has been upheld in its decision. As discussed above, however, UMTA's unwillingness has nothing to do with the arbitral nature or scope of the clause. Ironically, UMTA's construction of the scope of the clause is not even consistent with *Utah Construction*, since UMTA would refuse to hear any dispute which, in its opinion, does not involve "federal interests" notwithstanding that the dispute may arise under the contract within the meaning of *Utah Construction*.

The Disputes clause, on its face, provides for extra-judicial dispute resolution and clearly constitutes an arbitration agreement within the meaning of the Federal Arbitration Act. In relying exclusively upon *Utah Construction*, the State court construed the clause narrowly, contrary to the requirement under federal law that such clauses be construed liberally, in favor of

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whether the clause required UMTA to provide *de novo* review of a contracting officer's decision. To the extent the courts have concluded that *Utah Construction* does not govern the procedures for review but does govern the scope of the Disputes clause, even where the United States is not a party to the contract, they have turned that decision on its head.

arbitration. Moreover, the State court failed to send to arbitration those factual disputes clearly within the scope of the clause, as required by this Court's decision in *Dean Witter*. Finally, even if *Utah Construction* applies, a correct application of that decision would have caused the State court to submit to arbitration the question of whether the alleged defects can be remedied under the contract's warranty provisions, as was done in *Bethlehem Steel* and the *RTA litigation.*

CONCLUSION

For the reasons stated in this reply brief as well as in Grumman's Petition for Writ of Certiorari, the requested writ should issue.

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Respectfully submitted,

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